TAB H

GREAT PLAINS
COMMUNICATIONS

October 8, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

***Ex Parte* Notice**

Re: CC Docket No. 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime*

Dear Ms. Dortch:

On October 7, 2008, representatives of Great Plains Communications, Inc. of Blair, Nebraska; Consolidated Companies of Lincoln, Nebraska; Chickasaw Telephone Company of Sulphur, Oklahoma; Eastex Telephone Cooperative of Henderson, Texas; and the Texas Statewide Telephone Cooperatives, Inc. met with Amy Bender, legal advisor for wireline issues to FCC Chairman Martin, to present their views on responsible intercarrier compensation reforms.

Participants included Harold Furchtgott-Roth of Furchtgott-Roth Enterprises, Washington, D.C.; Cheryl Parrino of Parrino Strategic Consulting Group, Madison, Wisconsin; Larry Jones, Chief Financial Officer of Chickasaw Telephone Company; Weldon Gray, Chief Financial Officer of Eastex Telephone Cooperative; Jo Shotwell, of CHR Solutions, Inc., Austin, Texas; Wendy Thompson Fast, Chief Executive Officer of Consolidated Companies; and Ken Pfister, Vice President-Strategic Policy of Great Plains Communications.

The group presented its views on the factual and legal claims recently made by Verizon in its attempt to get the Commission to adopt a .0007/minute terminating charge. It also presented its analysis of the benefits that would accrue to AT&T and Verizon if their proposals were adopted, as well as the harm that would be done to rural ILECs and their customers under such proposals. The attached presentation represents the group's positions and was referred to at the meeting.

GREAT PLAINS
COMMUNICATIONS

This letter is being filed pursuant to Commission rules. Please contact me at (402) 426-6413 if you have any questions.

Sincerely,

Ken Pfister

Ken Pfister
Vice President-Strategic Policy
Great Plains Communications, Inc.

Attachment

Cc: Chairman Martin
Amy Bender

Responsible ICC Reform

Great Plains Communications, Inc.
Consolidated Companies
Chickasaw Telephone Co
Eastex Telephone Cooperative
Texas Statewide Telephone Cooperatives, Inc

Ken Pfister, Great Plains, Blair, NE
Wendy Thompson Fast, Consolidated Companies, Lincoln, NE
Larry Jones, Chickasaw Telephone Co., Sulphur, OK
Weldon Gray, Eastex Telephone Coop., Henderson, TX
Jo Shotwell, CHR Solutions for Texas Statewide Telephone Cooperatives, Inc

The Facts Regarding Traffic

The vast majority of traffic can be and is jurisdictionalized

- Only a small amount of traffic is VOIP and, an even smaller amount is "nomadic" VOIP
- The industry views NXX as a reasonable method for determining wireless call location
- The FCC requires all technologies to implement E911 which requires carriers to have the ability to determine location

The Facts Regarding $.0007

$.0007 is NOT a Reasonable Rate

- Virtually no rural ILECs have adopted the $0.0007 rate and the mirroring rule
- Rural carriers' reciprocal compensation rates range between $0.02 and $0.025*
  - These rates have been subject to arbitration and in some cases court challenges
- Additional costs vary by location and geography not unlike any other business
- A $.0007 rate does not cover the cost of billing let alone the costs of the service

* Nebraska, Iowa, and South Dakota (however may also apply to other carriers)

The Law

The law is clear – states have authority under S. 252, 152(b), and under court decisions

- Verizon's entire legal position is based on assertions, which the facts do not bear out
- The FCC's authority is expressly limited by federal and state statutes, federal rules (separations, TELRIC pricing, etc.), and court precedent (IUB, Louisiana, Smith vs. Illinois)
  - Preemption will result in uncertainty, reform grinding to a halt, and no additional broadband investment
- The courts have been clear: The FCC cannot set or telegraph rates under S. 251
  - There is no difference between Proxy and Default
    - Supreme Court: FCC may be able to set a default "methodology" but it cannot set default rates
    - If costs are greater than $.0007, creating a default rate of $.0007 is RATE SETTING, not establishing a methodology

The Policy

- Contrary to claims, implementing a mandatory $.0007 terminating rate for all carriers and all services:
  - Would be contrary to federal policy
  - Would harm rural customers and their carriers, absent balanced replacement revenue
  - Would subsidize carriers that use rural networks, but do not invest in rural infrastructure
  - Would halt further rural broadband investment

Scorecard-AT&T and Verizon Win

Action	AT&T and Verizon	Rural LECs
Reduction in ICC rates	Huge expense savings	Revenue decreases or potential short-term replacement revenues from risky sources
Default intercarrier rates	No need to negotiate or arbitrate reciprocal compensation	High cost rural networks are provided for virtually free
Elimination of originating access	IXCs receive all revenues	Expense incurred, but little compensation, especially 800
SLC increases	SLC increases will be unnecessary	Rural SLCs already at the cap. No provision for high local rates.
Benchmarks ignore state contributions	Benchmarks will have no impact	Rural customers in states with funds pay twice
Transiting rates frozen	Current rates locked in place	Pay high transiting rates to the large providers
Universal Service funding changes	No additional universal service funding required	Increased dependence on universal service funding
Contributions changes	Long distance and special access contribute less	Wireline residential customers contribute more

Result of $.0007

Customer Impact

- Urban, enterprise and special access see contribution and rate decreases, rural customers see increases
- Rural RBOC customers ignored
- RLECs stop deploying broadband

Competitive Situation

- Wireless more competitive
- Rural wireline less competitive
- Large carriers' market dominance

Financial Situation

- Cost reductions for large carriers
- Rural debt endangered and USF overdependence

Bottom Line

- The cycle of deregulation and increased consolidation, coupled with no reporting, creates an unregulated economic monopoly with market power.
- Comparable policies have resulted in disaster in the financial markets.
- Without sustainable cost recovery, rural carriers will experience financial disaster, their customers will have high rates and low service quality and the national infrastructure may no longer be interconnected, risking service and national security.

Long-Term USF Is Essential for Rate of Return ICC Reform

- Proposals that set ICC below cost are dangerous
  - halt broadband deployment
  - create uneconomic price signals
  - cause concerns for rural lenders
    - Rural lenders, such as CoBank, have warned that inadequate revenue streams for rural carriers would result in CoBank not extending new or additional credit
- The reform's USF price tag must be clear
- Long-term USF replacement revenues are a necessary precondition to any ICC rate reductions
- The questions are:
  - Will the FCC add additional money for High Cost funding and if so how much?
  - In the current political environment, are billions of dollars in replacement USF available?

Responsible Reform Would

- Address the Core Com remand narrowly
- Recognize legitimate state jurisdiction by using a carrot rather than an unlawful stick to invoke change
  - Allow states to opt in to interstate rate levels
  - Cap interstate rates with the residual recovered through USF
  - Set a benchmark rate for determining whether SLC increases or additional replacement revenues are necessary
  - Allow SLC increases or imputation if local rates are below the benchmark - rates must remain affordable
  - Provide replacement revenues to the extent necessary to cover costs and provide a reasonable return
- Recognize the progress rural companies have made in deploying broadband

TAB I

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October 9, 2008

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

Through their counsel, Cavalier Telephone and NuVox hereby respond to Verizon's "White Paper" discussing the FCC's legal authority to adopt Verizon's intercarrier compensation reform plan.[1] Verizon proposes that the Commission transition to a uniform, default rate of $0.0007 per minute of use to terminate all traffic from all providers on the Public Switched Telephone Network ("PSTN"), regardless of jurisdiction or technology.[2] Verizon argues that the Commission has the legal authority to adopt its proposal because the Commission can lawfully preempt state access charge regimes and extend a single, federal default rate to traffic subject to Section 251(b)(5) of the Communications Act of 1934, as amended ("Act").[3] As discussed below, Verizon's arguments do not survive scrutiny. The FCC does not have authority to mandate the intrastate rates proposed by Verizon in its plan.

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1 "The Commission Has Legal Authority to Adopt a Single, Default Rate for All Traffic Routed on the PSTN," Ex Parte Submission of Verizon, CC Docket No. 01-92 (filed Sept. 19, 2008) ("White Paper").

2 White Paper, at 1.

3 47 U.S.C. § 251(b)(5).

I. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO SET INTRASTATE ACCESS CHARGES

Verizon offers two arguments in support of its position that the Commission has the authority to preempt the states in setting intrastate access charges. *First*, Verizon argues that the growth of wireless and IP-based services makes it increasingly difficult for carriers to separate traffic into intrastate and interstate components for intercarrier compensation purposes, and there is no practical solution to this problem.[4] Verizon contends that the Commission therefore can justify preempting state access charge regimes on inseverability grounds.[5]

Second, Verizon argues that the Commission can look to the Supremacy Clause of the United States Constitution for authority. Verizon contends that the Commission can preempt state access charge regimes that differ from a federal default rate because these regimes pose an obstacle to the accomplishment of federal goals and policies, such as the development of a uniform system for all forms of intercarrier compensation.[6] Verizon's contention is that Section 2(b) of the Act[7] does not preclude such preemption, since the continued exercise of state authority over intrastate access charges would negate the exercise by the FCC of its own lawful authority and frustrate important federal policy objectives.[8]

As explained below, Verizon's arguments misstate or ignore relevant law and rely on overbroad and inaccurate generalizations regarding the state of the telecommunications marketplace and advancements in technology. As such, they do not provide a legally sufficient basis for the Commission's preemption of state access charge regimes.

Section 2(b) of the Act is well established as reserving to the states exclusive jurisdiction over all intrastate services, except where Congress has clearly carved out exceptions.[9] Federal court decisions confirm that in the absence of an express reservation of authority to the FCC, the Commission must respect the limits placed on its jurisdiction by

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4 White Paper, at 5-11.

5 *Id.*, at 15.

6 *Id.*, at 23.

7 47 U.S.C. § 152(b).

8 White Paper, at 25.

9 For example, Section 332(c)(3) of the Act gives the Commission exclusive jurisdiction over rates and entry of wireless carriers "[n]otwithstanding sections 2(b) and 221(b)." 47 U.S.C. § 332(c)(3)(A).

Section 2(b).[10] Indeed, the Commission itself has recognized these limits in refusing previous requests to preempt state access charge regimes.[11]

Despite Verizon's assertions to the contrary, the strict legal requirements that the Commission must satisfy to overcome Section 2(b)'s limits on its jurisdiction are not satisfied in this case. In *Louisiana Public Service Commission v. FCC*, the U.S. Supreme Court strongly confirmed the general jurisdiction of the states over intrastate communications, holding that the FCC may preempt state regulation of an intrastate matter *only* when the matter has interstate as well as intrastate aspects and when it is "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation."[12] Subsequent case law has refined the so-called "impossibility exception" to allow Commission preemption of state regulation only when each of the following criteria are met: (1) the matter to be regulated has both interstate and intrastate aspects; (2) Commission preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the Commission of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.[13] As shown below, neither the second nor the third requirements are satisfied here.

While *Louisiana PSC* permits preemption of state regulation where it is not possible to separate the interstate and intrastate components of the subject matter,[14] the Commission has never found that there is anything inextricable about interstate and intrastate access services. Each interexchange minute passed over local exchange facilities has been jurisdictionalized as one or the other for decades. The states have regulated the rates for intrastate access minutes during that entire period, and continue to do so today. Indeed, when the

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10 *See, e.g., National Association of State Utility Consumer Advocates v. FCC*, 457 F. 3d 1238 (11th Cir. 2006) (despite the Section 332(c)(3) exception and conferral of exclusive jurisdiction over the rates for wireless services in the federal agency, the scope of the term "rates" in Section 332(c)(3) is not so broad as to prevent the States from regulating line items on wireless customers bills).

11 See, e.g., *MTS and WATS Market-Structure*, Third Report and Order, 93 FCC 2d 241, 264 ¶69 (1983) (rejecting request to preempt state regulation of intrastate access charges) ("*MTS/WATS I*"); *In the Matter of MTS and WATS Market Structure*, Second Supplemental Notice of Inquiry and proposed Rulemaking, CC Docket No. 78-72, 77 F.C.C.2d 224, 232, ¶38 (1980) ("*MTS/WATS II*") (subsequent history omitted) (federal requirements regarding interstate access charges can be used as a model for intrastate interexchange access service compensation arrangements "if the states chose to follow it").

12 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n. 4 (1986) ("*Louisiana PSC*").

13 *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990), *citing Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C.Cir.1989); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C.Cir.1989).

14 *Louisiana PSC*, at 375 n. 4.

modern access charge regime was constructed in the early 1980s, the Commission considered and expressly rejected, on the basis of the clear divisions created by Section 2(b), arguments that it preempt state regulation of intrastate access charges.[15] Verizon has not shown why preemption is required today.

Verizon suggests that for some traffic, namely VoIP and wireless traffic, it is not realistically possible to separate intrastate calls from interstate calls. In Verizon's view, this justifies preemption of intrastate rate-setting authority. Even if Verizon's assertion were true, that would not justify preempting state regulation of intrastate access services for *other* types of calls, such as wireline-to-wireline carrier calls. Yet Verizon fails to make a convincing case for inseparability even as it applies to non-nomadic VoIP and wireless calls. Verizon argues that telephone numbers are not a valid proxy for geographic location, but ignores the Commission's requirement that E911 services be made available to VoIP end users, which is predicated on knowing the physical location of the VoIP end user.[16] If that is known, the end point of the call can be known. Similarly, the E911 requirements applicable to CMRS carriers provide the technology to determine the geographic location of a wireless carrier during any given call, a technology which could be used for the limited additional purpose of determining the jurisdictional nature of a wireless call.[17] At bottom, therefore, Verizon's assertion that "carriers can no longer reliably determine whether a call is local or long distance, intrastate, or interstate in order to apply different rates to each type of traffic"[18] ignores the realities of today's technologies.

Verizon also has not shown that preemption is necessary because continued state regulation threatens to frustrate the achievement of valid federal policies. Verizon contends that in the absence of preemption the FCC could not successfully eliminate the arbitrage that exists under the current intercarrier compensation regime.[19] Yet the record in this docket contains significant evidence regarding a variety of methods available to the Commission to resolve the problems for which Verizon invokes state preemption as the solution. Most importantly, the Commission can – and should – resolve the problem of "Phantom Traffic" by adopting the

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15 *See MTS/WATS I and MTS/WATS II, supra.*

16 *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

17 *See* 47 C.F.R. §20.18(e) ("Licensees subject to this section must provide to the designated Public Safety Answering Point Phase II enhanced 911 service, *i.e.*, the location of all 911 calls by longitude and latitude in conformance with Phase II accuracy requirements").

18 White Paper, at 2.

19 White Paper, at 23.

February 12, 2008 proposal of USTelecom[20] with the March 11, 2008 amendment proposed by NuVox, One Communications Corp., and XO Communications.[21] Specifically, the Commission should establish a binding method for determining the jurisdiction of any call that originates or terminates over the PSTN that allows originating and terminating carriers to bill based upon jurisdiction. The USTelecom proposal, as amended, would achieve this goal by strengthening the signaling rules and clarifying the obligations of parties to negotiate agreements governing the exchange of traffic.[22]

Further, the Commission can – and should – act promptly to bring clarity to the issue of intercarrier compensation for IP-based traffic that terminates on the PSTN.[23] This issue has been pending at the Commission for over a decade and the time is long past for the Commission to resolve this issue. Commission action on the Phantom Traffic and IP-PSTN traffic issues would address the arbitrage problems plaguing the telecommunications industry in a manner that is consistent with the delegation of authority between the FCC and the states as established by Congress.

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO SET RATES FOR TRAFFIC SUBJECT TO SECTION 251(B)(5) OF THE ACT

Verizon presents two arguments to support its claim that the Commission has the legal authority to set rates for traffic subject to Section 251(b)(5) of the Act. *First*, Verizon argues that the Commission can establish a single, default rate for such traffic "using its authority to establish rules to implement the reciprocal compensation duty."[24] In Verizon's view, the Commission can modify the pricing methodology that applies to reciprocal compensation to determine that Verizon's proposed national default rate satisfies the standard in Section 252(d)(2) of the Act for assessing rates for Section 251(b)(5) traffic. In other words, Verizon believes that the Commission can find Verizon's proposed rate to be a reasonable approximation of the additional costs of terminating calls subject to Section 251(b)(5). In making this argument, Verizon ignores both the express language of the Act and relevant case law.

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20 Letter from Glenn Reynolds, Vice Pres., Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Feb. 12, 2008).

21 Letter from Thomas Cohen, Counsel to NuVox Communications, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Mar. 11, 2008).

22 Verizon is a member of USTelecom and, thus, presumably supports the USTelecom proposal.

23 Any modification to the current treatment of IP-originated traffic to apply access charges should be applied on a prospective-only basis.

24 White Paper, at 26.

Congress conferred on state commissions explicit authority to set, *inter alia*, rates for traffic subject to reciprocal compensation under Section 251(b)(5). Section 252(c)(2) provides, in relevant part, that state commissions "shall establish any rates for interconnection, services, or network elements, according to subsection (d)." In turn, "subsection (d)" provides, in relevant part, that "a *State commission* shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions . . . determine such costs on the basis of a reasonable and approximation of the additional costs of terminating such calls."[25]

Decisions of the U.S. Supreme Court and the Eighth Circuit confirm that jurisdiction over the actual rates for the exchange of telecommunications traffic covered by Section 251(b)(5) resides with the states. In *AT&T v. Iowa Utilities Board*, the Supreme Court held that the Commission has jurisdiction under Section 201(b) of the Act to implement the local market opening provisions enumerated in Sections 251 and 252 by adopting regulations.[26] At the same time as it reached this holding, however, the Court also ruled that, although the Commission possesses authority under Sections 251 and 252 to design a methodology for use in establishing rates for interconnection and unbundled network elements, the rate setting itself is within the sole province of state commissions pursuant to Section 252.[27] The Eighth Circuit in *Iowa Utilities Board v. FCC* reiterated this point when it struck down the reciprocal compensation and unbundled network element ("UNE") rate proxies that the Commission established in its *Local Competition Order*.[28] The Court explained that while the U.S. Supreme Court in *AT&T v. Iowa Utilities Board* determined that the Commission has jurisdiction to design a pricing methodology, "the FCC does not have the jurisdiction to set the actual prices for the state Commissions to use."[29]

Verizon attempts to circumvent these clear limitations on the Commission's jurisdiction by suggesting that the Commission "modify the pricing methodology" and determine that the *costs* of terminating calls subject to Section 251(b)(5) is $.0007 per minute.[30] The fact that these "costs" would be equal to Verizon's desired uniform default rate in all cases proves

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25 47 U.S.C. §252(d)(2) (emphasis added).

26 *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

27 *Id.*, 525 U.S. at 384.

28 *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002); *see In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

29 *Iowa Utils. Bd.*, 219 F.3d at 757, citing *AT&T v. Iowa Utils. Bd., supra,* 525 U.S. at 385.

30 White Paper, at 26.

that Verizon's argument is nothing more than semantics. Verizon proffers absolutely no support for the conclusion that the $.0007 rate it proposes reflects the costs of terminating all types of traffic under any pricing methodology. Merely labeling the $.0007 rate the "cost" of traffic termination is not enough. The fact remains that the actual charges for terminating traffic subject to Section 251(b)(5) must be determined by the states and not by the FCC. The states must apply the pricing standards in Section 252(d) and implement the Commission's pricing methodology, thereby "determining the concrete result in particular circumstances."[31]

The *second* argument Verizon makes in support of its claim that the Commission can set rates for traffic subject to Section 251(b)(5) is that the Commission can forbear from enforcing Section 251(b)(5) pursuant to its authority under Section 10 of the Act. Under this argument, the Commission would no longer require carriers to enter into reciprocal compensation arrangements that are subject to state commission authority, and would instead require carriers to terminate traffic otherwise subject to Section 251(b)(5) at a single, federal rate.[32] This argument fails as well, as the Commission cannot, under Section 10, forbear from a statutory provision in order to replace it with a regulation that would otherwise not be permitted under the statute. That would turn the Commission into an extra-legislative body that could rewrite Title II of the Act at will, which was not what the Congress envisioned when it gave the Commission forbearance authority.

III. CONCLUSION

For these reasons, the Commission should reject Verizon's legal analysis, and confirm that it lacks the legal authority to adopt Verizon's intercarrier compensation reform plan.

Sincerely,

Genevieve Morelli

Brad E. Mutschelknaus
Genevieve Morelli

Their Attorneys

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[31] *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 384.

[32] White Paper, at 29.

TAB J

Docket 01-92

FILED/ACCEPTED

OCT 14 2008

Federal Communications Commission
Office of the Secretary

Cap Rock Telephone Cooperative, Inc.
P.O. BOX 300 - SPUR, TEXAS 79370
(806) 271-3336 FAX (806) 271-3601

October 9th, 2008

Dear Mr. Buckley:

Today I was contacted informing me that the FCC is seriously considering a proposal that would wrongly relieve communications industry giants, Verizon, AT&T, and others, of billions in annual access and intercarrier compensation responsibilities. I ask you to preclude the further consideration of this imprudent concept that would deny rural carriers such as ours rightful cost recovery compensation for the use of our infrastructure.

Looking over the plan, which lowers carriers cost recovery rate to $.0007 per minute, there are four devastating outcomes that will have a dramatic impact on our consumers – dramatically higher local rates, declining investment in rural networks, added pressure on the Universal Service Fund, and the violation of current federal laws.

First, the Verizon/AT&T plan, at the very least, will automatically result into a $4.00 monthly increase on every rural consumer's phone bill. In a time of economic downturn asking consumers to pay more for telephone service so national providers can reap a multibillion dollar windfall is not good for consumers. Not only would consumers be hurt but also the small providers who could potentially lose these costumers will be hurt. The pain could be so bad that rural providers will have to lay off employees and cut services to try to make sure they can continue doing business in these economically challenging areas. If small providers have to stop-providing services this could lead to additional problems for consumers.

Second, the revenue generated by access rates is one of the primary ways small carriers are able to obtain credit and repay debt. In addition to the federal Rural Utilities Service, there are two major private sector entities, RTFC and CoBank that provide financing to the rural telecom sector. The combined $9.1 billion in outstanding commitments that these entities hold today would be placed at immediate risk by the Verizon/AT&T proposal.

Third, this plan would add additional pressure on the USF program. The plan fails to lay out specifics of how much this will impact USF and offers no relief to the fund. Congress and the FCC have all agreed that USF should not grow unnecessarily but needs to be streamlined and updated. However, the Verizon/AT&T plan ignores this reality, and probably by design, for they know that it could destabilize the program.

Finally, the Verizon/AT&T scheme does not comply with the law. It unlawfully preempts state jurisdiction to set intrastate rates; it breaches state and federal separations compacts; it results in a "taking" by failing to provide assured asset replacement, and it neglects the Regulatory Flexibility Act that mandates unique policy for rural providers. The proposal is so legally flawed that industry groups are already forming to mount a legal challenge against it. If this issue is taken to the courts, it will create an even longer road to common sense intercarrier compensation reform.

I ask you further research this proposal and involve telcos that would be impacted by this change. I thank you for your attention to this matter and look forward to a prompt response to these concerns.

Sincerely,

Ricky Martinez

Ricky Martinez
Cap Rock Telephone Cooperative
National Telecommunications Cooperative Association Member
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October 15, 2008

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation*: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

Yesterday, Michael Hou of Broadview Networks, Inc., Ed Cadieux of NuVox Communications, Brad Lerner, of Cavalier Telephone, and the undersigned, of Kelley Drye & Warren, LLP, met with Scott Deutchman, Legal Advisor for Commissioner Copps. Our discussion focused on points addressed previously in filings made by the meeting participants in the above-captioned docket and contained in the attached presentation.

Please contact the undersigned at (202) 342-8531, if you have any questions about this letter. A copy of the presentation used at the meeting is attached.

Respectfully submitted,

Genevieve Morelli

Genevieve Morelli

Attachment

INTERCARRIER COMPENSATION REFORM

CC DOCKET NO. 01-92
October 16, 2008

Broadview Networks, Inc.
Cavalier Telephone
NuVox
XO Communications, LLC

The Intercarrier Compensation System Is In Need Of Overhaul But Is Not In Crisis

- The Commission should focus on deciding several discrete issues that are ripe for decision.
  - ISP-bound traffic
  - Phantom Traffic
  - Traffic Stimulation
- The Commission should issue an FNPRM containing tentative conclusions and proposed rules on broader intercarrier compensation issues and should afford interested parties reasonable time to comment on its proposals.

The Commission Should Adopt A Uniform Cost-Based Rate For Termination Of All Interstate Traffic

- The Commission should adopt a uniform cost-based rate for traffic termination that would apply to all traffic within the federal jurisdiction at the end of a transition period.
- The $0.0007 rate proposed by Verizon is below cost.
  - XO and NuVox cost studies demonstrate the costs of terminating traffic are well above $0.0007.
  - ITTA has indicated that $0.0007 is below the cost of billing for rural ILECs.
  - QSI nationwide survey of TELRIC-based reciprocal compensation rates shows a weighted average of $0.0027, more than 4X the rate proposed by Verizon.

Adoption Of A Below-Cost Termination Rate Would Create Market Distortions

- Adoption of a below-cost rate would create new arbitrage opportunities.
  - Carriers will seek out customers with disproportionate amounts of outbound traffic.
- Mandating a below-cost rate would discourage facilities investment.
  - Carriers would be unable to fully recover the costs of providing facilities-based service.
- Adoption of a below-cost rate would allow carriers with no facilities to "free ride" on the investments of facilities-based carriers.
- The lower the compensation rate, the greater the impetus for a revenue recovery mechanism.

The Commission Should Limit Its Decision To Traffic That Clearly Is Within Its Jurisdiction

- The Commission should limit its decision to interstate access (including both TDM and IP-PSTN traffic), ISP-bound traffic, and CMRS traffic.
  - IP-PSTN traffic should be treated the same as TDM traffic on a prospective-only basis.

The Compensation Scheme The FCC Adopts Cannot Impose Asymmetric Compensation Obligations On Different Classes Of Carriers

- Any approach under which CLECs would charge the end office compensation rate while ILECs would be permitted to assess additional access tandem and transport charges would not be competitively neutral and should be rejected.

The Transition Plan Must Be Competitively Neutral And Afford Carriers a Reasonable Opportunity To Adjust Their Business Plans

- The transition period should be of sufficient length to allow carriers and customers to adjust without undue hardship.
- The new uniform federal compensation rate should be phased-in over 7 years.

Any Revenue Recovery Mechanisms Adopted By The Commission Must Be Competitively Neutral

- CLECs must be permitted to participate in any revenue recovery mechanisms the Commission chooses to create.
- Revenue recovery mechanisms for price cap ILECs should be limited to increases in federal SLC caps for residential and multi-line businesses.
  - SLC cap increases must be administered in a competitively neutral manner.
- Any USF-based recovery mechanism should be limited to rate-of-return ILECs.

The Commission Should Not Address Network Architecture Issues

- There is no need for the Commission to address network architecture issues in order to reform intercarrier compensation.
  - Network interconnection matters are subject to state jurisdiction and oversight through the Sec. 251/252 ICA process.
  - Commission-imposed changes to current network interconnection arrangements are unnecessary and would be unduly disruptive.

The Commission Should Adhere To The Current Tariffing And ICA Framework

- Access rates should continue to be tariffed and made available to all similarly-situated carriers on a non-discriminatory basis.
- Traffic subject to reciprocal compensation should continue to be governed by ICAs pursuant to the Sec. 252 approval process and be available for opt in.
- Carriers should remain free to negotiate commercial agreements to govern their compensation obligations.
  - Commercial agreements are subject to filing at the FCC pursuant to Sec. 211 and must be made available to all similarly-situated carriers on a non-discriminatory basis.

Critical Issues With A Numbers-Based USF Contribution Mechanism Must Be Resolved Prior To Implementation

- Prior to implementation, the Commission must determine:
  - How to treat services that have no numbers.
    - The Commission should reject the notion of adopting a hybrid system, which would compel carriers to maintain two internal systems.
  - How to address the potential adverse impact on services that have a low revenue-per-number ratio or a low interstate volume-per-number ratio.
  - How to avoid adverse impact on small and mid-sized businesses, government and military users, universities, hospitals and others that assign many numbers behind a PBX or have many telephone numbers with little interstate/international volume.
- The Commission must adopt a transition period of at least 5 years.

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TAB L

October 15, 2008

EX PARTE PRESENTATION

Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; IP-Enabled Services, WC Docket No. 04-36; Universal Service Contribution Methodology, WC Docket No. 06-122.*

Dear Commissioners:

In response to the numerous, daily *Ex Parte* filings submitted to the Federal Communications Commission (the "Commission") addressing the various proposals regarding unified intercarrier compensation, the Midwest Telecom Executives (the "Executive Group")[1] readily accept the opportunity this process allows to voice its concerns regarding the Verizon and AT&T proposals, as well as express its support for the positions advocating just and reasonable reform for rural, rate of return carriers.

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[1] The Midwest Telecom Executives represent the following State Telecommunications Associations: the South Dakota Telecommunications Association; South Dakota Association of Telephone Cooperatives; Iowa Telecommunications Association; and North Dakota Association of Telecommunications Cooperatives.

Primarily, Verizon and AT&T are attempting to persuade the Commission to hastily adopt a unified intercarrier compensation regime consisting of a $0.0007 per minute termination rate[2] for all carriers.[3] The Executive Group shares the expressed concerns of NECA; namely, rural, rate of return carriers depend on cost-based access rates to provide high-quality, advanced services to customers in rural, high cost areas.[4] Such drastic, sweeping reform and the resulting financial detriment to rural carriers certainly would prohibit a rural carrier from any new or continued investment in the rural carriers' networks, including broadband deployment. In a recent *Ex Parte*, NTCA, by employing a simple application of sound, economic analysis, factually refutes Verizon's argument that non-unified rates create a "distortion that prevents market forces from distributing limited investment resources to their most efficient uses."[5] NTCA concludes that "if market forces were left alone to distribute investment resources to their most efficient uses, rural areas in the United States would not have any access to telecommunication or broadband services."[6] The Executive Group strongly agrees with NTCA's assessment that failure by the Commission to complete a comprehensive cost-benefit analysis prior to adopting any newly proposed intercarrier compensation regime would not be responsible.[7] Adopting a unified, terminating access rate that is not cost-based, jeopardizes the statutorily mandated principle of universal service, at the expense of the rural consumer.

Telecommunications industry policies have long recognized the distinct and different characteristics between rural and urban telecommunications providers, fairly taking into account that urban carriers generally serve densely-populated, compact geographic areas, while rural

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[2] In its various filings, AT&T has taken inconsistent positions concerning the disposition of originating rates. *See* Letter from Brian Benison, AT&T, to Marlene H. Dortch, FCC, CC Docket No. 01-92; WC Docket No. 05-337; CC Docket No. 96-45; WC Docket No. 99-68; WC Docket No. 07-135 (Sept. 12, 2008); Letter from Brian Benison, AT&T, to Marlene H. Dortch, FCC, CC Docket No. 01-92; WC Docket No. 05-337; CC Docket No. 96-45; WC Docket No. 99-68; WC Docket No. 07-135 (Oct. 7, 2008); Verizon's proposal, on the other hand, advocates dealing immediately with terminating rates by implementing severe rate reductions and proposing that the Commission issue a Further Notice of Proposed Rulemaking to reform originating access rates by December 31, 2009 further reducing access revenue for rural carriers. *See* Letter from Susanne A. Guyer, Verizon, to Chairman Martine and Commissioners Copps, Adelstein, Tate and McDowell, CC Docket No. 01-92 (Sept. 12, 2008) (Verizon Proposal).

[3] *See* Letter from Donna Epps, Verizon, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Sept. 19, 2008), attaching White Paper (Verizon); Letter from Susanne A. Guyer, Verizon, to Chairman Martine and Commissioners Copps, Adelstein, Tate and McDowell, CC Docket No. 01-92 (Sept. 12, 2008) (Verizon Proposal); Letter from AT&T, Verizon, The VON Coalition, et al., to Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell, WC Docket No. 04-36, CC Docket No. 01-92 (Aug. 6, 2008) (Coalition Proposal).

[4] *See* Letter from Richard Askoff, NECA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Oct. 6, 2008), (NECA)

[5] Verizon, pg. 21

[6] *See* NTCA *Ex Parte* Notice, from Daniel Mitchell to Marlene H. Dortch, FCC, CC Docket No. 01-92; WC Docket No. 04-36 (Sept. 30, 2008) (NTCA Ex Parte).

[7] NTCA *Ex Parte*, presentation at 3

providers serve smaller numbers of end-users throughout large, sparsely-populated geographic areas. In recognition of these differences and the simple fact that small, rural local exchange carriers ("RLEC") have much higher average investment and expense per subscriber line than their urban counterparts, it has long been a legislative and regulatory priority to ensure reasonably comparable services at comparable rates between urban and rural areas. Congress as part of § 254 has specifically mandated that consumers in rural, high cost areas have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services at rates comparable to what urban consumers receive.[8] If the Commission adopts a "one size fits all" intercarrier compensation regime, it is essentially depriving rural carriers of the ability to provide rural consumers with basic telecommunications services or advanced services at the comparable rates which Congress has mandated.

The Executive Group concurs in the assertion that "there is no basis for imposing a single, uniform rate on all carriers."[9] Verizon's feeble attempt to justify the $0.0007 per minute rate as "substantial evidence of a just and reasonable rate"[10] solely because Verizon has had recent experience negotiating interconnection agreements at this rate with carriers such as AT&T and Level 3 completely ignores and disregards the very identifiable and recognized distinctions between price cap carriers serving urban, low cost areas and rate of return carriers serving rural, high cost areas. Due to network variances and geographic locales, transport and termination costs do vary among carriers. As recent NECA studies have shown, a $0.0007 per minute rate for rural companies would fail to even cover the administrative costs associated with billing the related traffic.[11] NECA also recognizes and attempts to correct Verizon's misinterpretation of § 252(d)(2) by properly construing the language which provides for "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities..."[12] In every respect, the Executive Group agrees with NECA's position that § 252(d)(2) does not "mandate a single, nationwide rate, particularly one that is below incremental cost levels incurred by rate of return carriers in providing service in rural areas."[13]

Moreover, the Commission needs to bear in mind the potential consequences of its actions. Adopting a uniform, nationwide rate for all terminating traffic, including intrastate traffic, may incite an inundation of lengthy and costly litigation. While Verizon attempts to provide the

[8] 47 U.S.C. § 254(b)(3)

[9] *See* NTCA *Ex Parte*; Letter from Anne C. Boyle, Nebraska PSC, to Chairman Martin, FCC CC Docket No. 01-92 (Sept. 30, 2008); Letter from David Bergmann, NASUCA, to Chairman Martin, FCC, CC Docket No. 01-92 (Sept. 30, 2008), at pg. 2-3; Letter from Jonathan Lechter, Willkie Farr & Gallagher LLP (on behalf of Time Warner and One Comm.), to Marlene H. Dortch, FCC, CC Docket No. 01-92 (Oct. 2, 2008), presentation at 2-4.

[10] Verizon, pg. 31

[11] NECA, pg. 2

[12] 47 U.S.C. § 252(d)(2)(A)(i)

[13] NECA, pg. 3

Commission with questionable legal theories on which it can base its preemption of states' rights, Verizon acknowledges the strain years of additional litigation will have on the industry.[14] NTCA has provided the Commission with a thorough analysis of the legal fallacies contained in Verizon's reasoning.

Both the AT&T and Verizon proposals suggest establishing a new Replacement Mechanism ("RM"), which would be intended to recoup revenue loss due to terminating access and reciprocal compensation rate decline. Both proposals, however, fail to supply sufficient detail on how the RM would be funded or administered. The Executive Group shares the concerns expressed by the Nebraska Public Service Commission that creation of a new support mechanism without specifying a funding source or an economic basis for the amount of support needed may result in "excessive contributions from consumers to pay for the fund growth"[15] which further burdens consumers in tough financial times. In light of the current, nationwide financial crisis, consumers are being forced to prioritize the most basic of everyday necessities, including groceries, healthcare and utilities. Rural telecommunications consumers should not be faced with further financial difficulty for essential telecommunications services. As devastating as the current Verizon and AT&T proposals would be to the rural telecommunications industry and its end-users due to the immediate decline in terminating access, the Commission needs to thoroughly evaluate all aspects of these proposals. While the majority of *Ex Parte* filers are concerned about the loss of terminating access, only the NTCA filings have touched on the consequent loss of originating access. The plans purport to do away with originating access as well, financially straining rural consumers even further and amplifying the need for specific, predictable and sufficient replacement support, which is not demonstrated in these proposals. As noted above, it would not be responsible for the Commission to adopt a plan without comprehensively analyzing the effect a $0.0007 per minute rate would have not only on rural carriers dependent on access revenues for network investment, but also on the rural consumers who would be expected to shoulder the burden in the form of increased telephone service rates in contravention of the goals of universal service. Additionally, the Commission needs to scrutinize the nebulously proposed Replacement Mechanism, while considering the multi-billion dollar windfall Verizon and AT&T will receive due to the decreased access rates proposed under the Verizon and AT&T's proposals that such a support mechanism will need to offset.

The policy implications are clear; if the Commission blindly adopts a "one size fits all" intercarrier compensation regime resulting in the identical treatment of rural, rate of return carriers and urban, price cap carriers, the Commission is actively participating in the demise of rural network investment, increased service rates for rural consumers, and the potential that rural carriers will no longer have the means to provide their customers with the quality, advanced services and comparable rates Congress mandated when it enacted § 254(b)(3). Consequently, the Commission needs to seriously consider those policies and the ensuing effect a $0.0007 per minute rate will have on the carriers. While AT&T and Verizon, the companies proposing the

[14] *See* Verizon Supplemental Comments of Verizon and Verizon Wireless on Intercarrier Payments for ISP-Bound Traffic and the WorldCom Remand, CC Docket No. 01-92; CC Docket No. 96-98; CC Docket No. 99-68 (Oct. 2, 2008), pg. 3.

[15] *Id.*

$0.0007 rate, stand to gain billions of dollars in financial windfalls, this rate has the likely potential of driving rural carriers out of business and leaving rural consumers with little, if any, option for high quality and reliable local service. The Executive Group appreciates the time constraints the Commission is operating under in dealing with the mandate contained in the *Core* Remand.[16] We, however, join the Nebraska Public Service Commission, NTCA and NECA in urging the Commission to narrowly deal with the ISP-bound traffic issue contained in *Core* and only provide the Commission's legal rationale for excluding ISP-bound traffic from the reciprocal compensation requirements of § 251(b)(5) and devote the time and resources a just, reasonable and comprehensive intercarrier compensation reform plan deserves.

Sincerely,

Richard D. Coit
Executive Director and General Counsel
The South Dakota Telecommunications Association and
South Dakota Association of Telephone Cooperatives

David C. Duncan
President
Iowa Telecommunications Association

David Crothers
Executive Vice President
North Dakota Association of Telecommunications Cooperatives

[16] *In re Core Communications, Inc.*, No. 07-1446

TAB M

NTCA
The Voice of Rural Telecommunications
www.ntca.org

October 17, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

***Ex Parte* Written Notice:**

***In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; In the Matter of the High-Cost Universal Service Support and Federal-State Joint Board on Universal Service, WC Docket 05-337 and CC Docket 96-45; IP-Enabled Services,* WC Docket No. 04-36.**

Dear Ms. Dortch:

Enclosed please find a written ex parte containing NTCA's Additional Comments on the Adverse Impacts and Legal Arguments Against Adopting a Uniform Rate for Federal and State Intercarrier Compensation Charges. These additional comments are filed today in opposition to Verizon's September 19, 2008 ex parte advocating a $0.0007 uniform intercarrier compensation rate and Qwest's October 7, 2008 ex parte advocating a "bill and keep" access charge regime, which is essentially a $0.0 uniform intercarrier compensation rate.[1]

NTCA is concerned about these two proposals, as well as the Chairman's recently-announced draft plan to reform intercarrier compensation which appears to be similar to these proposals and is currently circulating at the Commission. A uniform intercarrier compensation rate would seriously harm rural consumers and the rural LECs that serve them. Moreover, adopting a uniform rate without additional consideration for small rural LECs may violate the federal Administrative Procedures Act, the Regulatory Flexibility Act, the Fifth Amendment's Takings Clause, and Section 410 of the Telecommunications Act's separations requirements.

For these reasons, the Commission should reject Verizon's $0.0007 proposal and Qwest's $0.0 bill and keep proposal. NTCA urges the Commission to issue a public notice, seek comment, and adopt the NTCA IC and USF Reform Plan filed July 11, 2008, for rate-of-return carriers as part of the Commission's comprehensive reform of intercarrier compensation and universal service.

[1] Verizon's Written Ex Parte (filed Sep. 19, 2008); Qwest Communications International, Inc. White Paper (filed Oct. 7, 2008).

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter and the enclosed written ex parte is being filed via ECFS with your office. If you have any questions, please do not hesitate to contact me at (703) 351-2016.

Sincerely,
/s/ Daniel Mitchell
Daniel Mitchell
Vice President, Legal & Industry

DM/kjr
Enclosure

cc: Chairman Kevin Martin
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Deborah Taylor Tate
Dana Shaffer
Amy Bender
Scott Deutchman
Scott Bergmann
Nicholas Alexander
Greg Orlando
Matthew Berry
Ajit Pai
Paula Silberthau
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
In the Matter of	)	
Developing a Unified Intercarrier Compensation	)	CC Docket No. 01-92
Regime	)	
In the Matter of IP-Enabled Services	)	WC Docket No. 04-36

NTCA

The Voice of Rural Telecommunications
www.ntca.org

ADDITIONAL COMMENTS ON THE ADVERSE IMPACTS AND LEGAL ARGUMENTS AGAINST ADOPTING A UNIFORM RATE FOR FEDERAL AND STATE INTERCARRIER COMPENSATION CHARGES

Respectfully submitted,

National Telecommunications
Cooperative Association

By: /s/ Daniel Mitchell
Daniel Mitchell
Vice President, Legal & Industry

/s/ Karlen Reed
Karlen Reed
Regulatory Counsel

Its Attorneys

4121 Wilson Boulevard, 10th Floor
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October 17, 2008

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ADDITIONAL COMMENTS ON THE ADVERSE IMPACTS AND LEGAL ARGUMENTS AGAINST ADOPTING A UNIFORM RATE FOR FEDERAL AND STATE INTERCARRIER COMPENSATION CHARGES

The National Telecommunications Cooperative Association (NTCA)[1] submits these additional comments as a supplement to its September 30, 2008 Ex Parte Filing[2] opposing the Verizon $0.0007 proposal.[3] In the midst of the worst financial crisis since the Great Depression, Verizon, AT&T and others (collectively Verizon) are desperately attempting to pull the wool over the eyes of the Federal Communications Commission (Commission or FCC), Congress, and the American Public in order to gain an unlawful annual $8 billion windfall at the expense of consumers and small, rural independent communications carriers.[4] Under the guise of solving regulatory arbitrage and fraud issues, Verizon erroneously asserts that the Commission has legal

[1] NTCA is a premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 585 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service rural local exchange carriers (LECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] NTCA Ex Parte, CC Docket No. 01-92 (Sept. 30, 2008).

[3] Verizon's Written Ex Parte Filed on September 19, 2008, *In the Matter of a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *IP-Enabled Services*, WC Docket No. 04-36; *Universal Service Contribution Methodology*, WC Docket No. 06-122. (Verizon Ex Parte, September 19, 2008).

[4] Verizon et al. Ex Parte, *In the Matter of a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *IP-Enabled Services*, WC Docket No. 04-36 (filed Aug. 7, 2008).

authority to preempt state commission jurisdiction and to set a uniform $0.0007 per minute terminating intercarrier compensation rate for all voice traffic that is transported and terminated on the public switched telecommunications network (PSTN), by all carriers, and in all jurisdictions (federal, state, and local).[5] The unraveling of Verizon's contorted legal arguments in the analysis set forth herein reveals that Congress granted state commissions, not the FCC, the exclusive legal authority to regulate and set intrastate toll access rates and local reciprocal compensation rates. The Verizon $0.0007 proposal and its resulting $8 billion annual windfall must be denied. Consumers must be spared the additional financial burden of paying for Verizon's unjust enrichment scheme while at the same time having to pay for the Wall Street disaster under the Government's taxpayer-financed bailout plan, both the result of allowing the industry giants free reign without sufficient regulatory oversight.

I. INTRODUCTION AND SUMMARY

A uniform rate would seriously harm rural consumers and the rural LECs that serve them. In these comments, NTCA presents several policy and legal arguments supporting the conclusion that the Commission should not adopt a uniform default rate or capped rate for access and reciprocal compensation. NTCA also demonstrates that the existing federal/state access rate regime does not obstruct competition or broadband deployment in the communications industry. Contrary to the claims of Verizon and others, transitioning to Internet Protocol (IP)-based services will not create jurisdictionally inseverable traffic so as to prevent carriers from classifying, jurisdictionalizing, and properly billing other carriers that originate and terminate traffic on any other carrier's network.

[5] Verizon Ex Parte, September 19, 2008.

From a legal standpoint, the Commission must reject the proposed uniform $0.0007 terminating access rate. Unlike price cap carriers whose switched access, transport and transiting rates are non-cost-based, rate-of-return (RoR) carriers switched access, transiting, and transport rates are cost-based and are approved by the FCC and state commissions and allocated to the interstate and intrastate jurisdictions under the FCC's federal/state separations rules pursuant to Sections 152(b) and 410 of the Telecommunications Act of 1996 ("the Act"). The proposed unification of all terminating interstate, intrastate, and local/reciprocal compensation access rates to a ***non-cost-based rate of $0.0007*** per minute for RoR carriers, therefore, would violate federal and state approved cost-based rate-of-return ratemaking and separations requirements under Section 410 of the Act, violate the state commissions' authority to set intrastate toll access rates under Section 152(b) of the Act and reciprocal compensation rates under Section 251(b)(5), and violate the takings clause in the 5th Amendment of the United States Constitution.

Sections 152(b) and 251(b)(5) of the Act provide the state commissions with exclusive jurisdiction to set intrastate toll access and reciprocal compensation rates. Thus, the FCC cannot rely on the Supremacy Clause to preempt state commission jurisdiction to regulate and set intrastate toll access and reciprocal compensation rates. Also, pursuant to Section 160 of the Act, the FCC cannot forbear state commission enforcement authority over intrastate toll and reciprocal compensation rates when Congress has explicitly granted this authority to the state commissions under Sections 152(b) and 251(b)(5) of the Act. Simply put, the FCC cannot preempt or forbear from enforcing a section of the Act for which the FCC does not possess Congressionally-delegated jurisdiction or enforcement authority.

In addition, prior to adopting any new intercarrier compensation proposal, the Commission is required to issue a new public notice and allow additional comment on the proposed action and alternatives or risk violation of the Administrative Procedures Act (APA). The $0.0007 proposal has not been put out for public comment. If the Commission decides to put the large price-cap carrier $0.0007 proposal out for public comment, it should also put out for public comment the NTCA intercarrier compensation (IC) and universal service (USF) Reform Plan filed on July 11, 2008. The NTCA Reform Plan is designed to specifically address the needs and concerns of small businesses, such as rate-of-return rural LECs serving consumers living in rural, high-cost areas throughout the United States. Such action will ensure that the Commission has attempted to meet the requirements of the APA and the Regulatory Flexibility Act (RFA) through the proper public notice and comment process envisioned by Congress.

Furthermore, the RFA requires the FCC to consider alternative rules that will reduce the economic impact on small entities, such as RoR rural carriers. The NTCA USF and IC Reform Plan would reduce the economic impact on small RoR broadband providers and rural consumers. Adopting and enforcing a uniform $0.0007 or $0.0000 (bill and keep) rate would violate the APA, RFA, Sections 152(b), 160, 251, 252 and 410 of the Act and effect a taking of property without due compensation in violation of the Fifth Amendment to the Constitution. Rather than violating these statutory requirements through the adoption of an unlawful uniform rate proposal that was never publicly noticed, NTCA urges the Commission to issue a public notice and seek comment on the NTCA proposal and other lawful proposals submitted in this proceeding.

Lastly, the NTCA IC and USF Reform Plan allows the Commission to reform intercarrier compensation and universal service within the federal and state jurisdictional guidelines set forth by Congress in the Act, APA, RFA, and United States Constitution. The NTCA proposal also allows the FCC to promote competition, spur broadband deployment, and most importantly, ensure that consumers living in rural high-cost areas are able to receive high-quality, affordable voice and broadband services. NTCA urges the Commission to issue a public notice, seek comment, and adopt the NTCA IC and USF Reform Plan for rate-of-return carriers as part of the Commission's comprehensive reform of intercarrier compensation and universal service.

II. A UNIFORM RATE WILL DRASTICALLY IMPACT SMALL RATE-OF-RETURN RURAL LECS AND THE CONSUMERS THEY SERVE.

A. The Agreed Upon Reciprocal Compensation Rates Between Verizon and CLECs Are Significantly Different than Rates Negotiated by Rural LECs for § 251(b)(5) Traffic.

Verizon argues that adopting a federal default rate of $0.0007 per minute, which is the same rate currently applicable to dial-up Internet traffic and currently under Federal Appellate Court Review, would result in no change in the rate at which carriers exchange voice traffic.[6] This argument is false, misleading and without merit. Verizon ignores the fact that virtually no rural LEC has ever adopted a $0.0007 rate for the exchange of interstate, intrastate or local voice traffic. Adopting a default rate of $0.0007 per minute would result in a significant change in the rates at which rural LECs exchange voice traffic subject to §251(b)(5) and would seriously jeopardize the ability of rural ILECs to recover the costs associated with such voice traffic.

According to Verizon, the $0.0007 per minute rate is consistent with Verizon's more recent experience in negotiating agreements with CLECs. As an example, Verizon negotiated and publicly filed interconnection agreements with a number of carriers, including AT&T and Level 3, which set a rate at or below $0.0007 per minute for terminating local traffic and for ISP-bound traffic. Verizon maintains that since it negotiated the $0.0007 per minute rate with

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[6] *Id.* at 29.

carriers such as AT&T and Level 3, such agreements provide substantial evidence that the $0.0007 per minute rate is a just and reasonable rate.[7] Verizon is wrong.

Verizon's negotiating history with carriers such as AT&T and Level 3, along with the rates it negotiated with such carriers, is not representative or consistent with the experience of rural LECs. For example, per minute rates between $0.02 and $0.025 are consistent with rural carriers' experience in Nebraska, Iowa, and South Dakota in negotiating agreements with CMRS carriers. In Iowa in particular, there are over 270 interconnection agreements on file between rural ILECs and various CMRS carriers at $0.02. In South Dakota, there are some interconnection agreements on file between rural ILECs and CMRS carriers at rates from $0.007 up and 50 such agreements between $0.02 and $0.03. In Nebraska, 38 interconnection agreements are on file between rural ILECs and CMRS carriers at rates between $0.02 and $0.024. The quantity of negotiated or arbitrated agreements at these rates constitute evidence that for rural ILECs these rates are just and reasonable. What Verizon cites as its additional terminating cost does not represent the reality of rural LECs and cannot be considered a just and reasonable terminating rate for rural LECs.

B. Verizon's Plan Ignores the Basic Principles of Economics.

Verizon argues that the current system prevents market forces from distributing limited investment resources to their most efficient uses.[8] This argument is also false. If market forces were left alone to distribute investment resources to their most efficient uses, rural areas in the United States today would not have access to telecommunication or advanced services, such as broadband, because the costs would be unaffordable to customers. Since rural customers are an integral part of the telecommunications market, the costs of providing service to this market

[7] *Id.* at 31.
[8] *Id.* at 21.

segment are part of the total economic costs of having an efficient, nationwide telecommunications system. The current system of non-uniform rates from carrier to carrier for intercarrier compensation is an efficient way to address cost disparities. Differentiated rates from carrier to carrier for intercarrier compensation are efficient because they allocate resources according to the cost associated with conducting business in different geographies.

It would be irresponsible for the FCC to adopt an intercarrier compensation reform plan without conducting a complete cost-benefit analysis of changing from the current practice to Verizon's proposed plan. There are multiple economic concerns with Verizon's proposed plan. First, Verizon does not quantify the supposed benefit of its plan. Verizon refers to the benefit of its plan as being simpler and easier to administer. Only anecdotal evidence is provided for how the proposed rate of $0.0007 per minute was determined, which leads to a second concern. According to Verizon, the Commission should adopt $0.0007 for all traffic because Verizon negotiated other interconnection agreements at this rate.[9] The laws of supply and demand for the entire market should be used to determine the equilibrium price of any service. When determined by the rules of the market, the prices of many goods and services - for example, gas, food, electricity, and many others - vary regionally to reflect variations in cost. The price of interconnection (access and reciprocal compensation) should not be any different. Third, the Verizon proposal does not provide any information on the economic costs of the proposed plan. There is no evidence that standard economic methodology was applied or even considered in the preparation of the proposed plan. Before adopting a reform plan, the Commission should conduct a comprehensive cost-benefit analysis that would take into account the full economic costs and benefits of such a plan.

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[9] *Id.* at 5.

III. VERIZON'S FACTUAL AND LEGAL BASES TO JUSTIFY A UNIFORM TERMINATING ACCESS RATE OF $0.0007 ARE FALSE, MISLEADING, AND WITHOUT MERIT.

On September 19, 2008, Verizon filed an Ex Parte letter with the FCC regarding the FCC's legal authority to adopt the comprehensive intercarrier compensation reform plan filed by Verizon and Verizon Wireless on September 12, 2008.[10] With the Ex Parte letter, Verizon attached a "White Paper" entitled "The Commission Has Legal Authority to Adopt a Single, Default Rate for All Traffic Routed on the PSTN." The White Paper contains several factual misrepresentations relative to the following: (1) inseverability and the jurisdictional nature of traffic on or touching the Public Switched Telephone Network (PSTN); (2) the rapidity of decline in the demand for traditional wireline services; (3) the universality of a $0.0007 rate in negotiated or arbitrated agreements; and (4) the economics of a uniform rate applied to all carriers. The following analysis permits the FCC to clearly see that the factual foundation on which Verizon bases its legal and policy arguments in its radical plan is invalid.

Verizon's prognosis of the demise of traditional landline subscriptions and long distance service is at best premature. By citing several statistics, Verizon attempts to drive the Commission to the conclusion that traditional landline subscriptions and long distance services are in the last days of their life cycle and complete substitution by CMRS and VoIP services is imminent. To make its case for VoIP substitution, Verizon cites reports from Morgan Stanley and Frost and Sullivan that indicate VoIP providers will reach 31% of households by 2011. What Verizon fails to say is that only managed private network VoIP is a viable substitute for carrier grade two-way voice service and the market for Internet based voice service (computer to computer and computer to PSTN) has limited application, especially for enterprise customers

[10] Verizon Ex Parte, September 19, 2008.

who cannot tolerate the poor quality of service delivered by unmanaged VoIP services.[11]

Verizon cites a National Center for Health Statistics report that estimates 15.8% of households have fully cut the cord and substituted with CMRS.[12] Verizon also cites the 2008 Trends in Telephone Service report which indicates that wireline access minutes have dropped from 792 billion minutes in 2000 to 544 billion minutes in 2006.[13] A reasoned assessment of these figures should lead one to conclude that while CMRS substitution is occurring for some landline subscriptions and traditional long distance market, fully 84.2% of households have not cut the cord. Moreover, there is still significant demand for traditional long distance service. Finally, Verizon fails to provide any evidence of CMRS substitution in business and enterprise markets.

Verizon claims that all the evidence indicates that substitution trends will continue at an ever-increasing rate. Based on this claim, Verizon argues that the Commission should anticipate changes in the communications marketplace and not wait until changes have arrived or have finished before revising its regulatory regime.[14] Based on the Commission's Twelfth Report on CMRS Competition, growth in CMRS subscriptions has slowed from 14.2% in 2004 to 12.1% in 2006.[15] This evidence contradicts Verizon's claims. Furthermore, the Commission should not anticipate market substitution unless there is ample and compelling evidence that a particular service is nearing the end of its life cycle. That is not the case with either landline or traditional

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[11] *Id.* at 6.
[12] *Id.* at 7.
[13] *Ibid.*
[14] *Id.* at 8.
[15] FCC Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Twelfth Report, WT Docket No. 07-71, released Feb. 4, 2008; at Para. 207, Table A-1: CTIA's Semi-Annual Mobile Telephone Industry Survey, pg. 126.

long distance service based on circuit switching and the North American Numbering Plan (NANP).

IV. TRANSITIONING TO IP-BASED SERVICES WILL NOT CREATE JURISDICTIONALLY INSEVERABLE TRAFFIC.

Verizon's description of all PSTN traffic as jurisdictionally inseverable is inconsistent with networks' technical characteristics and with physical reality. In its White Paper, Verizon attempts to mislead the Commission into believing that IP-based and wireless services somehow move telecommunications out of the realm of the physical world and into the world of "location-independent services." Based on its specious claim of "location independence," Verizon makes the incredible assertion that jurisdictional distinctions can no longer be made and that all intercarrier compensation should be reduced to a single rate – $0.0007 per MOU – for all types of traffic ***and for all carriers***.

Verizon builds on its faulty foundation by mischaracterizing the Commission's statements regarding VoIP service in the *Vonage Order*. Verizon claims that the "Commission found in the *Vonage Order* that all Voice over Internet Protocol ('VoIP') traffic is inseverable and, therefore, interstate for jurisdictional purposes."[16] The Commission, in fact, found no such thing. In the *Vonage Order*, the Commission found there was no possibility of separating Vonage's ***service*** – not its traffic – into interstate and intrastate components so as to allow the Minnesota Public Utility Commission to exert control over only the intrastate service while leaving the interstate service under federal control. The Commission made no such determination with respect to VoIP ***traffic***.

[16] Verizon Ex Parte, September 19, 2008, at 3.

Similarly, Verizon claims that IP-based and wireless services "up-end traditional conceptions of location-based and device-based phone numbers,"[17] because they "eliminate the historical understanding that a 'call' has only two end points."[18] Verizon contends that since a telephone number is no longer a reliable indicator of the geographic location of a user of IP-based or wireless services, such services are "location-independent."[19] All of these assertions are false.

While it is true that association between network addresses and devices (or locations) is not static with IP or wireless network platforms, this does not mean that at any particular time the location of the network device is non-determinative. Neither the use of radio signals in place of wireline transmission nor the use of Internet protocol in place of TDM and circuit switching will cause users to escape their physical existence at some particular geographic location on the Earth.

The assertion that IP-based services or wireless services operate independently of the physical transmission of information-bearing signals between end user devices is simply false. End user devices are located at real, geographical locations. Electronic signals passed between such devices are associated with distinct physical locations. With wireless services, users must be within range of a transmission tower, usually a few miles, in order to make use of the service. Obviously, the wireless tower has a real geographical location.[20] Similarly, every assigned IP

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[17] *Id.* at 5.
[18] *Id.* at 6.
[19] *Id.* at 9-10.
[20] The Missoula Plan, which was filed by a broad segment of the industry, supported the use of telephone numbers/rate centers as a default proxy for the location of the end points of a call. *See* Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, CC Docket 01-92, (July 24, 2006) at 25.

address, whether public[21] or private, is unambiguously associated with a single, specific electronic device, which necessarily resides in a particular geographical location. Internet protocol is, above all else, an *end-to-end* addressing scheme designed expressly for the purpose of exchanging data between two parties.[22] Each data packet contains both the IP address of the source CPE and the IP address of the destination CPE. Since the primary task of an IP network is to deliver IP data packets from their source CPE to their destination CPE, IP-based communications must also have real, verifiable end points.

The only ambiguities in associating an IP address with the exact physical location of a device occur either when the device is using wireless Internet access or the device utilizes Dynamic Host Configuration Protocol ("DHCP") to obtain an Internet address from a pool of addresses kept by a DHCP server. Yet even in those cases, the uncertainty in a device's exact location only rarely rises to a level that would preclude the association of an Internet address with the state in which the equipment is located.

Verizon attempts to obfuscate the distinction between Internet-based (or "over-the-top") VoIP services, such as Vonage's DigitalVoice, and facilities-based VoIP services, such as Verizon's own VoiceWing. In Verizon's August 6, 2007 letter to Chairman Martin, Verizon argues that because of the advanced features associated with both types of VoIP service, the Commission should find ***all*** such services to be inseverable and should preempt all forms of state regulation over ***all*** kinds of VoIP services. Verizon refers to the "locations of the myriad

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[21] Public Internet addresses are well-defined within the address space specified by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organization, under the terms of its contract with the U.S. Department of Commerce.

[22] *See* Robert Cannon, "Will the Real Internet Please Stand Up: An Attorney's Quest to Define the Internet" at 8-9, Telecommunications Policy Research Conference 2002. Html version is available at http://intel.si.umich.edu/tprc/papers/2002/165/RealInternet.htm

databases, servers, and websites accessed during a communications session"[23] – which are as integral to facilities-based VoIP as to Internet-based VoIP – as being relevant to the jurisdiction of a call from one person to another. Verizon neglects to mention that the PSTN now employs databases in far-off places to support features such as calling name delivery and number portability, yet the geographic locations of these PSTN databases do not determine call jurisdiction.

Verizon asserts that there is no service driven need to develop capabilities to identify the end points of a call.[24] When Verizon claims that networks cannot identify end user locations, Verizon completely ignores the Commission's E911 and CALEA policies, which require wireless and interconnected VoIP providers to deliver users' location information directly to emergency or law enforcement personnel. If a user's location were such a mystery in wireless and VoIP networks, what would be the point of implementing these policies? Verizon actually confirms that, by investing in real time systems, service providers can ascertain the true geographic location of the end points of a call. This admission affirms that there is no question about whether traffic is severable, only a question as to the willingness of providers to institute systems to gather necessary information to determine the end points of a call.[25]

Finally, Verizon argues that subjecting VoIP and other IP-based services to state regulations designed for different services in a different era would conflict with Congress's and the Commission's policies to encourage the development and deployment of broadband services, as set forth in Section 706 of the 1996 Act.[26] Verizon is wrong once again. In the FCC's August 5, 2008 amicus brief in *Vonage v. Nebraska Public Service Commission*, the FCC

[23] August 6, 2007, Verizon Ex Parte Notice, WC Docket No. 04-36 at 10.
[24] Verizon Ex Parte, September 19, 2008 at 12.
[25] *Id.* at 17.
[26] *Id.* at 14.

recognized that a portion of VoIP service revenue is properly classified as intrastate in nature and thus can be separated and assessed for state universal service funding (USF) purposes.[27] If interconnected VoIP traffic can be separated and accessed for USF purposes, it can properly be separated, jurisdictionalized and billed for access charges.

Today, for billions of landline, wireless, and VoIP minutes, the end points are determinative and can be accurately billed. Verizon obfuscates the true question of severability; that is "can the end points of a call be determined and on that basis does traffic have a jurisdictional nature." The clear answer is <u>yes</u>; traffic is severable. Verizon clearly admits that the true location of the end points of a transmission can be determined with proper equipment and real time systems.[28] The Commission itself supported this position concerning interconnected VoIP in its amicus brief filed in support of the Nebraska Public Service Commission in *Vonage v. Nebraska Public Service Commission.*[29] Verizon's premise of inseverability is contrary to the recognition of intrastate as well as interstate elements in interconnected VoIP service, as indicated in the FCC's amicus brief and in the Commission's interconnected VoIP universal service contribution order.[30]

V. THE FCC DOES NOT HAVE LEGAL AUTHORITY TO SET STATE ACCESS RATES AND RECIPROCAL COMPENSATION RATES FOR VOICE TRAFFIC ON THE PSTN.

Verizon and AT&T argue that the 1999 Supreme Court case *AT&T Corp. v. Iowa Utilities Board* provides the FCC the legal authority to establish the regulatory framework for

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[27] *Brief of Amicus Curiae United States and Federal Communications Commission Supporting Appellant's request for Reversal, In the United States Court of Appeals For the Eighth Circuit, No. 08-1764, Vonage Holdings Corp. and Vonage Network Inc., v. Nebraska Public Service Commission et al.* on Appeal from the United States District Court for the District of Nebraska, filed August 5, 2008 at 16-17.
[28] Verizon Ex Parte, September 19, 2008, at 17.
[29] *Vonage v. Nebraska Public Service Commission,* No. 08-1764 (8th Cir.), pg. 16-17 (August 5, 2008).
[30] Universal Service Fund Contribution Methodology, 21 FCC Rcd 7518 (2006), *aff'd in part and rev'd in part, Vonage Holdings Corp v. FCC,* 489 F.3rd 1232 (D.C. Cir. 2007).

setting Section 251(b)(5) rates (*i.e.*, the TELRIC regulatory framework), under the provisions contained in the 1996 Telecommunications Act.[31] Under this theory, Verizon and AT&T argue that the FCC also has legal authority to set a cap/default rate of $0.0007 for Section 251(b)(5) traffic. Verizon and AT&T's arguments, however, fail to address the unambiguous distinction made by the Supreme Court in *Iowa Utilities Board.* In its finding, the Supreme Court concluded that while the Commission has authority to design and implement pricing standards and methodologies, it is the states that have the authority to apply the pricing standards and implement the methodologies to determine and set the actual rates.[32] Contrary to Verizon's assertions, Supreme Court precedent dictates that the role of the state commission is to establish rates; therefore, the Commission does not have legal authority to establish a single default rate for all traffic routed over the PSTN.[33] In fact, Verizon and Verizon Wireless in their most recent legal filing on October 2, 2008, concerning ISP-bound traffic and the *WorldCom/Core Remand* correctly stated "Congress tasked the "state commission[s]" – not this Commission – with the duty to establish any rates" for reciprocal compensation. 47 U.S.C. §252(c)(2)."[34] An examination of the prevailing federal statutory regime and case law on state preemption reveals this is true for establishing reciprocal compensation rates as well as intrastate toll access rates.

Further, Section 152(b) of the Act provides the state commissions with exclusive jurisdiction over intrastate rates and services. In *Louisiana Public Service Commission v. FCC,* the United States Supreme Court examined this statute and the Supremacy Clause in reviewing

[31] *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 119 S.Ct. 721 (Jan 25, 1999) (*Iowa Utilities Board*).
[32] *Id.*, 525 U.S. at 385.
[33] Verizon Ex Parte, September 19, 2008 at 5.
[34] Supplemental Comments of Verizon and Verizon Wireless, *Intercarrier Payments for ISP-bound Traffic and The WorldCom Remand,* CC Docket Nos. 01-92, 96-98, and 99-68, page 3, filed October 2, 2008.

the FCC's authority to preempt state control over depreciation for intrastate rates.[35] In this case, the Court found that the Supremacy Clause provides Congress with the power to preempt state law and that preemption occurs:

1. When Congress, in enacting a federal statute, expresses a clear attempt to pre-empt state law;
2. When there is outright or actual conflict between federal and state law;
3. Where compliance with both federal and state law is in effect physically impossible;
4. Where there is implicit in federal law a barrier to state regulation;
5. Where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law: or
6. Where the law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[36]

The Court, however, said: "In our view, the jurisdictional limitations placed on the FCC by 152(b), coupled with the fact that the Act provides for a "separations" proceeding to determine the portions of a single asset that are used for interstate and intrastate service, 47 U.S.C. 410(c), answer both pre-emption theories." The Court specifically found that Section 152(b) "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes"[37] and held:

> [Section 152(b)] asserts that "nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications service...." **By its terms this section fences off from the FCC reach or regulation intrastate matters-indeed, including matters "in connection with" intrastate service.** Moreover, the language with which it does so is certainly as sweeping as the wording

[35] *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, 54 USWL 4505, p. 12, (May 27, 1986) (*Louisiana*).
[36] *Louisiana*, 476 U.S. at 368-370 *citing Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 604 (1977); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 180 (1962); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 312, 83 S.Ct. 1210, 10 L.Ed. 284 (1963); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 4909 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947); and *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The Court also noted that "Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. *Fidelity Savings & Loan Assn. v. De la Cuesta*, *485* U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 664 (1982); *Capital Cities Inc.*, 467 U.S. 691, 104 S.Ct. 2964, 81 L.Ed. 580 (1984)." *Id.*
[37] *Id.*, 476 U.S. at 373.

of the provision declaring the purpose of the Act and the role of the FCC.[38] [Emphasis Added]

In *Louisiana,* the Commission attempted to support its claim of preemption of depreciation methods with two arguments. First, the Commission could regulate intrastate because Congress had intended the depreciation provisions of the Communications Act to bind state commissions--*i.e.,* that the depreciation provisions "applied" to intrastate ratemaking.[39] The Supreme Court observed that "[w]hile it is, no doubt, possible to find some support in the broad language of the section for respondents' position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b) ...."[40] The Commission also argued that, even if the statute's depreciation provisions did not apply to intrastate commerce, regulation of state depreciation methods would enable it to effectuate the federal policy of encouraging competition in interstate telecommunications.[41] The Supreme Court also rejected that argument because, even though the FCC's broad regulatory authority normally would have been enough to justify its regulation of intrastate depreciation methods that affected interstate commerce,[42] Section 152(b) prevented the Commission from taking intrastate action solely because it furthered an interstate goal.[43] The Supreme Court further affirmed this finding in the *Iowa Utilities Board* case and stated the need for both limitations [federal and state] is exemplified by *Louisiana* where the FCC claimed authority to issue rules governing depreciation methods applied by local telephone companies.[44]-

[38] *Id.*, 476 U.S. at 370.
[39] *Id.*, 476 U.S. at 376-7
[40] *Id.*, 476 U.S. at 377.
[41] *Id.*, 476 U.S. at 369.
[42] *Id.*, 476 U.S. at 370; cf. *Houston & Shreveport R. Co. v. United States*, 234 U.S. 342, 358, 34 S.Ct. 833, 58 L.Ed. 1341 (1914).
[43] *Louisiana*, 476 U.S. at 374.
[44] *Iowa Utilities Board.*

As demonstrated, analysis of the precedent established in both the *Louisiana* and *Iowa Utilities Board* cases clearly rejects Verizon's preemption argument. Congress, in enacting the Communications Act of 1934, as amended, did not "express a clear attempt to preempt state law."[45] To the contrary, Congress expressly preserved State Commission jurisdiction over charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications services pursuant to Section 152(b). Indeed, Congress enhanced State Commission jurisdiction in 1996, when it amended the Communications Act of 1934 with Section 251(d)(3) entitled in capital letters by Congress the "PRESERVATION OF STATE ACCESS REGULATIONS." Section 251(d)(3) states that in "prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission that -

> (A) Establishes access and interconnection obligations of local exchange carriers;
> (B) Is consistent with the requirements of this section: and
> (C) Does not substantially prevent the implementation of the requirements of this section and the purposes of this part.

Furthermore, Section 251(b)(5) explicitly provides the state commissions with the legal "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" for voice calls that originate and terminate in a local calling area shared by two competing carriers.[46] Thus, Congress has expressly directed that the State Commissions, and not the FCC, shall exercise jurisdiction over charges, classifications, practices, facilities, or

[45] *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 604 (1977).
[46] Section 252(d)(2)(B) states that this paragraph shall not be construed - to precluded under Section 252(d)(2)(B)(i) arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or to authorize under 252(d)(2)(B)(ii) the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to additional costs of such calls.

regulations for or in connection with intrastate communications services, including local reciprocal compensation.[47]

For obvious reasons, Verizon ignores the Supreme Court's *Louisiana* analysis and holding in its legal arguments and asserts that the Supremacy Clause provides the FCC with the power to preempt state commission jurisdiction and ratemaking authority under Sections 152(b), 251(b)(5), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii) of the Act.[48] Verizon is wrong and is attempting to deceive the Commission. As demonstrated below, the circumstances for federal preemption as described above do not apply in this proceeding. Verizon's attempt to gut Sections 152(b), 251(b)(5), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii) of the Act and the entire federal/state access regime should be completely rejected.

In addition, there is no outright or actual conflict between federal and state law.[49] Congress has clearly established that the FCC has jurisdiction over interstate (Federal) communications pursuant to Section 151, and state commissions have jurisdiction over intrastate (State) and reciprocal compensation (local) communications pursuant to Sections 152, 251, and 252 of the Act. These jurisdictional and authoritative boundaries have worked together since 1934 and have flourished throughout the 1990s and 2000s in establishing vibrant competitive communications markets that have led to new and innovative services, new jobs, and opportunities for new entrants and consumers. Indeed, compliance with both federal and state

[47] Section 252(b)(2)(A) states for the purpose of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable – (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the traditional costs of terminating such calls.

[48] Verizon Ex Parte, September 19, 2008, at 1-39.

[49] *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 180 (1962).

intercarrier compensation laws and regulations has never been nor is it now physically impossible to implement and enforce.[50]

Moreover, there is nothing in federal law, implicit or explicit, which provides a barrier to state commissions to set intrastate (state) toll access rates or reciprocal compensation (local) access rates[51] nor has Congress legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law.[52] Indeed, as demonstrated, the Act, itself, pursuant to Sections 152(b), 251(b)(5), 251(d)(3), 252(c)(2), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii) explicitly provides multiple barriers which prevent the FCC, not state commissions, from setting intrastate (state) toll access rates and reciprocal compensation (local) access rates.

VI. THE EXISTING ACCESS CHARGE AND RECIPROCAL COMPENSATION ARRANGEMENTS POSE NO OBSTACLE TO THE TELECOMMUNICATIONS INDUSTRY, SO THERE IS NO NEED FOR A UNIFORM RATE.

Verizon argues that Sections 152(b), 251(b)(5), 251(d)(3), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii) pose an obstacle to the accomplishment and execution of the full objectives of Congress, and thus the FCC should preempt state commission jurisdiction to set and regulate intrastate access charges and reciprocal compensation rates.[53] As shown below, Verizon arguments are self-serving, misleading and without merit. The FCC would be acting outside the scope of its congressionally delegated authority if it adopts and implements rules under these false legal arguments.[54]

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[50] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 312, 83 S.Ct. 1210, 10 L.Ed. 284 (1963).
[51] *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 4909 (1983).
[52] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).
[53] Verizon Ex Parte, September 19, 2008, at 19-26, 29-35.
[54] *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Verizon asserts that prevention of arbitrage and fraud provides the basis for the FCC to assert preemption and the need for a uniform rate of $0.0007 per minute.[55] Verizon claims that different rates are an obstacle to competition, investment, and deployment of new services.[56] These arguments are false. Competition particularly from wireless has flourished under the current regulatory regime. New services and investment have blossomed under this regulatory regime. The record does not contain evidence, much less substantial evidence, that going to a uniform rate would increase competition, investment, or new services in the communications industry.

Indeed, the Commission's most recent report on the state of competition in the wireless industry using a new data source that allows for a significantly more granular and accurate analysis of mobile telephone service deployment and competition found that:

- Approximately 280 million people, or 99.8 percent of the U.S. population, have one or more different operators offering mobile telephone service in the census blocks in which they live.
- More than 95 percent of the U.S. population lives in areas with at least three mobile telephone operators competing to offer service.
- More than half of the U.S. population lives in areas with at least five competing mobile telephone operators.
- Approximately 99.3 percent of the U.S. population living in rural counties, or 60.6 million people, have one or more different operators offering mobile telephone service in the census blocks within the rural counties in which they live.
- Approximately 82 percent of the U.S. population lives in census blocks with at least one mobile broadband provider offering service.[57]

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[55] Verizon Ex Parte, September 19, 2008 at 28.
[56] *Id.* at 26-28.
[57] FCC Release Annual Report on State of Competition in the Wireless Industry (FCC 08-28). New Release, February 4, 2008. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279986A1.doc.

In addition, during 2006, the number of mobile telephone subscribers in the United States rose from 213 million to 241.8 million, increasing the nationwide penetration rate to approximately 80 percent. Subscribers in the second half of 2006 spent 714 minutes per month using their mobile devices, up from 708 minutes per month during the second half of 2005. Also, the volume of text messaging traffic rose from 9.8 billion messages sent during December 2005 to 18.7 billon messages sent during December 2006. Revenue per minute, which can be used to measure the per-minute price of mobile telephone service, remained unchanged during 2006 at $0.07.[58] As the foregoing data illustrates, new services and investment are flourishing under today's federal/state access charge regime.

Verizon further argues that the FCC should preempt state jurisdiction over state and local access charges because carriers cannot or will not be able to determine the federal/state/local jurisdiction of the majority of voice traffic in the future.[59] In other words, landline, wireless and Internet voice traffic today and in the future will be "inseverable."[60] This is also untrue. Today, the overwhelming majority of voice traffic is separated, categorized and jurisdictionalized. In 2007, there were 15 billion identified and jurisdictionalized interstate (federal) access minutes according to the National Exchange Carrier Association (NECA) Access Service Tariff F.C.C. No. 5.[61] Billing between carriers for originating and terminating voice calls in all jurisdictions – federal, state, and local - is estimated at approximately $8 billion dollars per year. If these voice calls were inseverable, unbillable, and unrecoverable as alleged by Verizon, the industry would have come to a screeching halt a long time ago.

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[58] *Ibid.*
[59] Verizon Ex Parte, September 19, 2008 at 3-4.
[60] *Ibid.*
[61] NECA Access Service Tariff F.C.C. No. 5, Transmittal No. 1214, Volume 3, pg 4 (June 16, 2008).

Instead, the opposite is happening in the communications market under the existing federal/state access charge regime. Markets for access today are extremely competitive and opportunities to raise federal and state access rates are prohibited and constrained by competition. The correct conclusion, as the then BellSouth, now AT&T, noted with respect to special access, is for the government not to regulate and certainly not for the government to insist on uniform rates.[62] Wireless and VoIP traffic has flourished under the current federal/state regulatory regime. Current federal/state regulation is not an impediment to competition, to new investment, or to new broadband services. There is no need for the government to change the regulatory structure to achieve the FCC's and Congress' stated policy goals. Those goals are being achieved under the current federal/state access structure.[63]

Verizon further claims that under today's federal/state access rate regime the FCC's policies to encourage the deployment of broadband as set forth in Section 706 of Act have been limited.[64] This claim is false. In June 2008, the Commission submitted its Fifth Section 706 Report to Congress on the status of broadband deployment throughout the United States. In this Report, the FCC concluded that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion and therefore the FCC is not required to take "immediate action" to rectify any failure.[65] Verizon's argument that the current federal/state

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[62] Comments of BellSouth, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*. WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*. RM 10593, pp. 13-19, filed June 13, 2005. See, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517632863.

[63] See, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Report (rel. June 12, 2008) (Fifth 706 Report); Also see, *12th Annual CMRS Competition Report, Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Report FCC 08-28 (rel. Feb. 4, 2008).

[64] Verizon Ex Parte, September 19, 2008 at 26-28.

[65] Fifth 706 Report.

access regime stands as an obstacle to the accomplishment and execution of the objectives of Congress in Section 706 of the Act, falls on its face in light of the FCC's most recent Section 706 findings and Report to Congress.

VII. THE COMMISSION CANNOT SET INTRASTATE ACCESS RATES.

Verizon and AT&T assume that if the FCC can assert jurisdiction over Section 251(b)(5) reciprocal compensation rates via a $0.0007 default rate, then the FCC has jurisdiction over all federal and state access rates, including intrastate toll rates. By its terms, Section 251(b)(5) requires each local exchange carrier "to establish reciprocal compensation arrangements for the transport and termination of TELECOMMUNICATIONS" (emphasis added). Telecommunications is defined in Section 153(43) and such definition does not speak in terms of "local" traffic. However, in 47 CFR 51.701(b)(1) the FCC has provided that for reciprocal compensation purposes, "telecommunications traffic means: telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access . . ." With regard to CMRS traffic (b)(2) provides that it is "traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area." Thus, by FCC Rule, reciprocal compensation excludes interstate and intrastate exchange access traffic.

VIII. "BILL AND KEEP" IS NOT A PRICING METHODOLOGY, BUT IS A $0.00 RATE FOR EXCHANGE OF TRAFFIC WHICH CAN ONLY BE ALLOWED THROUGH A MUTUAL AGREEMENT BETWEEN CARRIERS, AND CANNOT BE IMPLEMENTED BY THE FCC.

Qwest has suggested that the Commission has the legal authority to adopt a "bill and keep" regime for all intercarrier compensation.[66] Qwest asserts that the Commission can rely on the *Iowa Utilities Board* case, Sections 251(b)(5), 252(d)(2), and 201 to extend its jurisdiction over intrastate toll rates and apply bill and keep to all interstate, intrastate and local/reciprocal compensation traffic that touches the PSTN.[67] These assertions are false, misleading and without merit. Bill and keep is a mutual agreement between two consenting carriers that sets the rate for terminating traffic at $0.00 per minute when the traffic flows between their networks are relatively equal and the cost of billing would exceed the revenues billed for the traffic. Bill and keep is not a pricing methodology as falsely claimed by Qwest.

Qwest's acknowledgement that "the bill and keep methodology admittedly provides state commissions with very little discretion over the pricing mechanism" greatly understates the complete elimination of state authority that would be caused by the bill and keep de facto rate of $0.00 per minute.[68] State commissions will have no discretion to set intrastate toll access rates and local reciprocal compensation rates as directed by Congress pursuant to Sections 152(b) and 251(b)(5) because bill and keep mandates a rate of zero. Thus, bill and keep is a rate and does not fall within the parameters of the *Iowa Utilities Board* case directives which permitted the FCC to adopt a TELRIC pricing methodology under Sections 251 and 252 of the Act.

[66] Qwest Communications International, Inc. White Paper (filed Oct. 7, 2008), (Qwest Oct. 7 letter), at 1-2.
[67] *Id.* at 5-6.
[68] *Ibid.*

Contrary to Qwest's claim that the Commission is at liberty to apply Sections 251(b)(5) and 252(d)(2) to all traffic, the Commission should recall the U.S. Supreme Court's distinction between methodology and ratemaking:

> The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing Standards' set forth in Section 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.[69]

Congress has specifically granted state commissions authority to establish rates for Section 252(b)(5) traffic. Verizon, in its September 19, 2008, $0.0007 per-minute terminating rate proposal, states that "Section 252(d)(2) sets a standard for assessing rates for Section 251(b)(5) traffic."[70] A standard, however, is not a rate; rather, it is a methodology for rate-making. Verizon blurs this critical distinction by saying that the standard for assessing rates under 252(d)(2)(A)(ii) must reflect a reasonable approximation of the additional costs to terminate calls. By establishing an all-encompassing $0.0007 per minute rate, the Commission would be supplanting the state public service commissions of their rightful authority to set intrastate toll access rates and local reciprocal compensation rates. Accordingly, the Commission does not have the legal authority to adopt a default rate. such as $0.0007 or $0.0000 (bill and keep) for all calls, by all carriers, in all jurisdictions.

IX. THE FCC CANNOT FORBEAR FROM ENFORCING A REGULATION WHEN THE FCC DOES NOT HAVE STATUTORY AUTHORITY TO ENFORCE THE REGULATION IN THE FIRST PLACE.

Verizon argues that if the Commission is prohibited from establishing a single $0.0007 per minute terminating access rates for all traffic, for all carriers, and in all jurisdictions, then in the alternative, the FCC should "forbear from Section 251(b)(5) traffic (local reciprocal

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[69] *Iowa Utilities Board*. 525 U.S. at 384.
[70] Verizon Ex Parte, September 19, 2008 at 26.

compensation traffic) and regulate such traffic directly" because it is inseverable, and then set the rate for this traffic at $0.0007 per minute.[71] Verizon's alternative legal argument is flawed in many respects, the most glaring is the fact that the Commission cannot forbear from enforcing a section of the Act for which the FCC does not possess Congressionally-delegated jurisdiction or enforcement authority.

As demonstrated above, the FCC does not have legal authority to set rates under Section 251(b)(5). Section 251(b)(5), when read in conjunction with Section 252, explicitly provides the state commissions with the legal "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" for voice calls that originate and terminate in a local calling area shared by two competing carriers. Congress has expressly delegated to the state commissions, to the exclusion of the FCC (unless the state commission fails to act, in which case, *and only in which case*, Congress authorized action by the FCC pursuant to Section 252(e)(5)) jurisdiction over charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications services, including reciprocal compensation. Thus, the FCC cannot forbear from enforcing a section of the Act for which the FCC does not possess Congressionally-delegated jurisdiction or enforcement authority.

Further, Section 251(b)(5) only applies to traffic for calls that originate and terminate in a local calling area shared by two competing carriers. For a wireline to wireline carrier call this is a local area within a state's borders. For an intrastate toll call – a call that originates in the local calling area of one carrier and terminates in a different local calling area of another carrier, but both local calling areas are located within the same State's borders – the FCC has no jurisdiction whatsoever to set the rates for such intrastate toll calls. Section 152(b) provides the state

[71] Verizon Ex Parte, September 19, 2008 at 26-29.

commissions with exclusive jurisdiction over these calls as demonstrated above and confirmed by the Supreme Court.[72] Again, the FCC cannot forbear from enforcing a section of the Act which it does not have jurisdiction and authority to enforce.

Moreover, under the Act's forbearance provision, 47 U.S.C. Section 160(a), the FCC may forbear from applying a regulation or any provision of the Act, if the Commission determines that the enforcement of such regulation is: (a) "not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and not unjustly or unreasonably discriminatory," (b) "enforcement of such regulation or provision is not necessary for the protection of consumers," and (c) "forbearance from applying such provision or regulation is consistent with the public interest." Notwithstanding the fact that the FCC cannot set local reciprocal compensation rates under Section 251(b)(5) or set intrastate toll rates under Section 152(b), if state commissions were prohibited from setting and enforcing access rates established under Sections 251(b)(5) and 152(b), consumers living rural areas of the United States served by RoR carriers would see their voice and broadband rates increase to unjust and unreasonable levels, their financial ability to purchase broadband become limited or prohibited, and the goals of competition, investment, and broadband deployment would grind to halt in rural America.

X. ADOPTING A NEW INTERCARRIER COMPENSATION REGIME WITHOUT ADDITIONAL PUBLIC NOTICE AND OPPORTUNITY FOR COMMENT WILL VIOLATE THE FEDERAL ADMINISTRATIVE PROCEDURES ACT.

On May 2, 2008, the Commission issued a news release that invited commenters to refresh the record on intercarrier compensation proposals.[73] The Commission has not, however,

[72] *Louisiana.*

issued a new public notice and sought comment on any specific proposal(s) for revising the intercarrier compensation regime since 2007. A review of the Commission's primary intercarrier compensation docket, CC Docket No. 01-92, reveals that the most recent public notice was released on March 16, 2007, which extended the deadline for comments on the Missoula Plan.[74] Over 450 documents have been submitted in this docket since March 16, 2007, according to the FCC's electronic communications filing service (ECFS). Several commenters, including Verizon, Sprint and AT&T, have assured the Commission in recent filings that the $.0007 rate is appropriate based on interconnection agreements that are already in place.[75] Those agreements, however, are not specifically identified, nor have they been made part of the public or confidential record. Consequently, commenters have not had an opportunity to view or critique the agreements. Furthermore, the Commission has not yet expressed its views on any of the myriad of proposals submitted in this huge docket, nor has the Commission expressed which alternatives it is considering.

The Commission cannot rely on a news release and private party submissions to support a change in the rules governing intercarrier compensation because it does not give commenters adequate notice or a fair opportunity to challenge the veracity of the evidence submitted and would violate the Administrative Procedures Act (APA).[76] Section 553(b) of the APA requires the Commission to publish a general notice for proposed rulemaking in the Federal Register which includes "either the terms or substance of the proposed rule or a description of the subjects

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[73] FCC News Release "Interim Cap Clears Path for Comprehensive Reform – Commission Posted to Move Forward on Difficult Decisions Necessary to Promote and Advance Affordable Telecommunications for All Americans" (rel. May 2, 2008).

[74] Notice, DA 07-1337 ("Pleading Cycle Extended for Comment on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism"), CC Docket No. 01-92.

[75] Verizon Ex Parte, September 19, 2008; Sprint Ex Parte, October 1, 2008; AT&T Ex Parte, July 17, 2008. All ex partes were filed in CC Docket No. 01-92.

[76] The Administrative Procedures Act is codified as 5 U.S.C. §§ 551 – 559.

and issues involved." Section 553(c) requires the Commission to "give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments ..." The notice required by the APA "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."[77] Notice allows adversarial critique of an agency's proposal and is "one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion."[78] The opportunity to comment is meaningless if an agency fails to give notice of the data upon which proposed action would be based.[79] When opportunity for such notice and comment is inadequate, remand is frequently the correct remedy.[80]

Furthermore, the Commission cannot craft a resulting intercarrier compensation rate that bears little resemblance to the public notice. In *National Bank Media Coalition v. FCC*, the Second Circuit found that the FCC failed to provide adequate public notice when it adopted an order that differed substantially from its original notice.[81] The Court also found that the Commission inappropriately relied on non-disclosed maps and internal studies.[82] The Court said that absent clear and adequate notice of specific proposals, interested parties cannot fairly anticipate rule variations proposed in the comments, and notice of these variations cannot thereby be imputed to such parties. Similarly, the reliance on the non-noticed studies and maps was unlawful.

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[77] *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977) (*Home Box Office*).
[78] *Id.* at 55.
[79] *Id.* at 35.
[80] *Public Service Commission of District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 2001); *Reeder v. FCC*, 865 F.2d 1298, 1304-05 (D.C. Cir. 1989).
[81] *National Black Media Coalition v. FCC*, 791 F.2d 1016 (2nd Cir. 1986).
[82] *Id.* at 1022.

Additionally, the Commission cannot rely on evidence that lies outside the record because it does not give commenters adequate notice or a fair opportunity to challenge the veracity of the evidence. To accept such bold statements without question will violate the APA. If the Commission chooses to rely on existing interconnection agreements to support the imposition of $0.0007 intercarrier compensation rate, then the Commission must make available those agreements, either in a public format or subject to non-disclosure agreements.

Prior to adopting any intercarrier compensation proposal, the Commission must issue a new notice and allow additional comment on the proposed action. The FCC's notice is designed to reveal the agency's reasoning and the data upon which the agency relies. The Commission, itself, must provide notice of its regulatory proposal and cannot rely on the submissions of a private party to "bootstrap" notice.[83] The Commission should also express its views on the targeted proposal(s) and must identify which alternatives it is considering.[84] Additionally, the Commission must disclose the data upon which a proposed rule is based.[85] Otherwise, the FCC's actions may be viewed as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and therefore unlawful and subject to judicial disapproval.[86]

XI. ENFORCING A UNIFORM RATE WILL RESULT IN A TAKING OF PROPERTY WITHOUT DUE COMPENSATION IN VIOLATION OF THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Pursuant to the 5[th] Amendment,[87] Sections 201 and 254 of the Act, and existing regulatory precedent,[88] the Commission has a legal responsibility to provide rates and a rate

[83] *American Federation of Labor v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985).
[84] *Home Box Office*, 567 F.2d at 35.
[85] *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982).
[86] 5 U.S.C. § 706(2)(A).
[87] United States Constitution, Amendment V.
[88] *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 01-157, Fourteenth Report & Order (May 23, 2001) ("RTF Order"), ¶¶ 24 and 25; *In the Matter of Multi-Association Group* (MAG Plan

structure for rural RoR carriers that does not result in a confiscatory taking and will provide an opportunity to recover costs as well as earn a reasonable return on those investments made to provide service.[89] The Commission has previously recognized this responsibility, specifically stating that "[r]ate-of-return carriers charge rates that are designed to provide the revenue required to cover costs and to achieve a prescribed return on investment."[90] In exchange for a reasonable opportunity to recover costs including a reasonable return, RoR carriers have provided quality service at rates reasonably comparable to those in urban areas to all rural consumers in the areas they serve, and have fulfilled all carrier of last resort obligations.

Courts have long evaluated utility rates against the back drop of the requirements of the Constitution and confiscatory rates.[91] It is clear that "[t]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[92] To guard against a confiscatory rate, the Commission should employ the general standard that the rate mechanisms used by the Commission should provide a RoR carrier with a reasonable opportunity to recover costs, including a reasonable rate of return.[93] The current $0.0007 and bill and keep proposals do not provide this opportunity.

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for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers, Second Order and Further Notice of Proposed Rulemaking, FCC Docket No. 01-304, rel. October 11, 2001 ("MAG Order"), ¶¶ 3, 12, 131, 132, and 134.

[89] *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 253-254 (1987).

[90] MAG order (FCC 01-304), ¶ 19.

[91] See, *e.g.*, *Bluefield Water Works v. Public Service Commission*, 262 U.S. 679 (1923); *Federal Power Commission, et al. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[92] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989) (*citing Covington & L Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law); *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942); *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 391-392 (1974).

[93] See discussion of *FPC v. Hope Natural Gas*, 320 U.S. 591 (1944) in *Duquesne* at 310. "Today we reaffirm these teachings of Hope Natural Gas: "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Id.*, at 602, 64 S.Ct. at 288. This language, of course, does not dispense with all of the constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory: whether a particular rate is "unjust" or "unreasonable" will

The record is devoid of evidence that would support a conclusion that increasing the subscriber line charge (SLC) will provide a RoR carrier with a reasonable opportunity to recover costs. Reliance on raising the SLC or increasing local service rates to a benchmark rate to recover a RoR carrier's lost revenues due to a reduction of the intrastate access rates is baseless. Whether there is any reasonable assurance of cost recovery would depend on the particular market and whether the rural ILEC could actually keep its customers after putting in effect the proposed local rate and SLC increases. There is nothing in the record indicating that the benchmarked local service rates are based on any affordability data or study. The record is equally deficient in evidence that shows that benchmarked rates would be affordable or competitive with alternate technologies. The Commission may inadvertently violate federal universal service policy and objectives by requiring RoR carriers to raise local rates too high.

The Commission has consistently recognized this legal responsibility and has regulated in a manner that allows RoR carriers to recover their costs along with a reasonable return on investment.[94] The Commission has also recognized the unique characteristics of rural RoR carriers and the unique challenges they face in providing quality service to their customers.[95] The Commission articulated the unique characteristics of rural RoR carriers, their dependence on access charge revenues, and the need to preserve universal service in the *MAG Order*, stating that "Our examination of the record reveals that rate-of-return carriers generally are more dependent on their interstate access charge revenue streams and universal service support than price cap carriers and, therefore, more sensitive to disruption of those streams. . . . . The approach that we adopt will provide these carriers with certainty and stability by ensuring that

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depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional overtones."

94 RTF Order, ¶¶ 24 and 25 and MAG Order, ¶¶ 3, 12, 131, 132, and 134.

95 RTF Order, ¶¶ 24, 25, and 79 and MAG Order, ¶¶ 3, 12, 131, 132, and 134

the access charge reforms we adopt do not affect this important revenue stream."[96] The Commission has recognized that RoR regulation along with the universal service fund have worked well in rural areas, not only for providing quality service at reasonable rates but also for deploying broadband in rural areas.[97] NTCA, therefore, urges the Commission not to impose the $0.0007 rate or similar bill and keep proposals for large price cap carriers on rural LECs, and instead adopt the NTCA proposal, which is specifically tailored for small RoR rural LECs.

XII. SECTION 410 REQUIRES THE COMMISSION TO ADHERE TO THE FEDERAL-STATE SEPARATIONS ALLOCATIONS PROCEDURES.

Section 410 imposes a legal obligation on the FCC to adhere to the Federal-State Separations Allocation procedures and requirements before the FCC can eliminate or adopt new access rates.[98] Specifically Section 410(c) provides:

> The Commission ***shall*** refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this title, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. ... (Emphasis added).

As the United States Supreme Court noted in *Louisiana,* Section 410 of the Act provides for a 'separations' proceeding to determine the portions of assets that are used for interstate and intrastate services.[99] This provision also applies to new rates that would explicitly supersede the existing federal/state access charge regime, which forms the basis of today's interstate and intrastate access charges and cost recovery. The proposed uniform $0.0007 access rate would directly violate Section 410 of the Act since the $.0007 rate has not been vetted directly through a rulemaking process and referred to the Federal-State Joint Board. Furthermore, referral to the

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[96] MAG Order, ¶ 131.
[97] MAG Order, ¶ 224 and Joint Board Recommended Decision, ¶¶ 30 and 39.
[98] 47 U.S.C. § 410.
[99] *Louisiana*, 467 U.S. at 691.

Federal-State Joint Board is mandatory and an obligation to act, rather than a discretionary choice.[100]

Today, the method for the allocation of accounting costs and revenue between the states and the federal jurisdiction consists of an elaborate combination of allocations, direct assignments, and actual use measurements.[101] Essential to the current separations process is the application of a Uniform System of Accounts and the ability to measure traffic between defined end points in a circuit-switched environment, where the locations of the end points of a call determine the jurisdiction of the traffic and, therefore, the allocation of certain network costs to a jurisdiction. Allocated costs and jurisdictional traffic demand are used in the interstate jurisdiction (as well as in many states) to provide the basis for access charge ratemaking.

In such jurisdictions, the allocation of costs and revenues is also the foundation for the assessment and distribution processes in universal service funding systems. The federal rules allocate a portion of loop cost to the federal jurisdiction if loop costs in a study area are extraordinary.[102] For rural carriers, these extraordinary loop costs reassigned to the federal jurisdiction are recovered through the federal High Cost Loop Support program. A similar process applies to switching cost and recovery through the federal Local Switching Support program.[103]

Congress created Section 410 and the Federal-State Joint Board to resolve disputes over regulatory jurisdiction, and Section 410 continues to be recognized as a viable means to divide regulatory responsibility between the federal and state governments.[104] As part of establishing a

[100] *Crocket Telephone Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992); *Haig v. Agee*, 453 U.S. 280, 294, 101 S.Ct. 2766, 2775, 69 L.Ed.2d. 640 n.26 (1981).
[101] 47 C.F.R. § 36.2 (a).
[102] 47 C.F.R. § 36.631 Expense Adjustment.
[103] 47 C.F.R. § 54.301 Local Switching Support.
[104] *Verizon Maryland Inc. v. Global NAPS*, 377 F.3d 355, 371 (4th Cir. 2004).

new federal/state access regime, the Commission, pursuant to Section 410, must first modify existing separations rules through a rulemaking proceeding. As such, a determination should be made as to the portion of RoR carriers' costs that are to be funded by the federal and state jurisdictions. Although it is difficult to determine the nature of future PSTN and IP traffic, it is necessary and appropriate that the FCC and state commissions have a role in this process. Consequently, adopting a uniform access rate without a statutory required federal/state separations proceeding would violate Section 410 of the Act.

XIII. THE REGULATORY FLEXIBILITY ACT REQUIRES THE FCC TO CONSIDER ALTERNATIVE RULES THAT WILL REDUCE THE ECONOMIC IMPACT ON SMALL ENTITIES.

The Regulatory Flexibility Act (5 U.S.C. § 601) requires the FCC to consider alternative rules that will reduce the economic impact on small entities. The Commission should proffer NTCA's universal service and intercarrier compensation reform proposal filed on July 11, 2008, for public notice and seek comment on NTCA's proposal which will reduce the economic burden on small rural LECs and the consumers they serve.[105] NTCA's proposal will also promote the public interest, convenience, and necessity, will spur development of new advanced communications technologies and broadband deployment, and most importantly will ensure that consumers living in rural high-cost areas are able to receive high-quality, affordable voice and broadband services. The Commission should reject the ill-conceived, unlawful Verizon proposal to adopt a single default rate for all traffic routed on the PSTN, and alternatively issue a public notice and seek comment on NTCA's IC and USF reform proposal and other lawful proposals to ensure consumers living in rural high-cost areas are able to continue to receive high-quality, affordable voice and broadband services.

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[105] NTCA's Interim Universal Service & Intercarrier Compensation Reform Proposal, filed July 11, 2008, CC Docket No. 01-92 (NTCA Proposal).

XIV. CONCLUSION

The Commission is under a legal duty to obey the law. The FCC does not have the privilege or discretion to obey only statutory provisions that help promote current FCC policies and ignore the statutory provisions that prohibit FCC policies and/or require the FCC and State Commission cooperation and partnership. The FCC must adhere to all provisions in the Communications Act of 1934, as amended, before it can enact new access reform regulations under Section 251(g).

The FCC must obey Section 152(b), which provides the states with jurisdiction and authority to set intrastate toll access rates, and Section 410, which imposes a legal obligation on the FCC to work with the state commissions and adhere to the Federal-State Separations Allocation procedures and requirements. Before the FCC can eliminate or adopt new access reform rules that would explicitly supersede the existing federal/state access charge regime, the Commission must change the current Federal-State cost separations allocations, which form the basis of today's interstate and intrastate access charges and cost recovery. Section 251(g) does not grant the FCC the authority to ignore its duties and obligations under Sections 152, 251, 252, and 410 of the Act.

If new access rules and regulations are adopted or the FCC eliminates access rules and obligations which result in the confiscation of RoR carrier property, the FCC has violated the 5th Amendment Takings Clause. Adopting rules to supersede access under Section 251(g) or adopting a uniform terminating access rate that applies to all carriers, to all voice calls, in all jurisdictions would also violate the Administrative Procedure Act and the Regulatory Flexibility Act. Parties would have been prevented the opportunity to be heard and the economic harm imposed on small rural LEC would have been ignored. The Commission does not have the statutory authority to set state intrastate toll rates, set local reciprocal compensation rates or to eliminate state access rates altogether. The Verizon $0.0007 proposal, the Qwest bill & keep proposal, and other similar unlawful proposals must, therefore, be denied. Alternatively, NTCA at this time urges the Commission to issue a public notice and seek comment on the NTCA proposal and other lawful proposals submitted in this proceeding.

Respectfully submitted,

NTCA

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October 17, 2008

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the National Telecommunications Cooperative Association's (NTCA's) Additional Comments in WC Docket No. 05-337, CC Docket No. 96-45 and Docket No. CC 01-92 was served on this 17th day of October 2008 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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